Supreme Court, U.S.
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No. 90-157

In The

Supreme Court of the United States

October Term, 1990

TRUSTEES OF THE CENTENNIAL STATE CARPENTERS PENSION TRUST FUND,

Petitioners,

v.

CENTRIC CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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July 20, 1990

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QUESTIONS PRESENTED

1. Whether an employer's failure to initiate arbitration over a withdrawal liability assessment results in a waiver of all defenses to the withdrawal liability assessment.

2. Whether the Tenth Circuit applied an erroneous burden of proof on the Respondent's defense of laches.

3. Whether the equitable doctrine of laches is a viable defense to a lawsuit for collection of withdrawal liability under Section 4301 of the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1001 *et seq.*

LIST OF PARTIES

The parties to the proceedings below were the Trustees of the Centennial State Carpenters Pension Trust Fund and Centric Corporation. During all times relevant to this matter, the following individuals served as Trustees of the Centennial State Carpenters Pension Trust Fund: Art Choury, Jack Dalman, Ed Dungan, Bob Pierson, Edward Rylands, Theodore Sanford, Floyd Hitchcock, Perry McGinnis, Paul Wanamaker, Lee Morris, Forrest Crouse, Bernard Robinson, John Hunter, Wilbur Scheller, Charles Schmucker, Keith Runyan, Dick Fullerton, Peggy Neely, Joe Ross, Chris Seegmiller, Richard Wilbur, Richard Ammidown, Cal Clifford, Phil Harris, Ron Norby, Mark Vappi, Haskell Sloan, Richard Beaudoin, and Arny Frederiksen.

Centric Corporation has no parent companies, subsidiaries, or affiliates. Industrial Indemnity Company was not listed as party in the caption, but has an interest in the outcome of this proceeding.

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TRUSTEES OF THE CENTENNIAL STATE CARPENTERS PENSION TRUST FUND,

Petitioners,

v.

CENTRIC CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners, the Trustees of the Centennial State Carpenters Pension Trust Fund ("Trustees") pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on April 23, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 901 F.2d 1514, and is reprinted in the Appendix hereto, pp. 1-14, *infra*.

The memorandum opinion and order of the United States District Court for the District of Colorado, dated March 14, 1989, has not been reported. It is reprinted in the Appendix hereto, pp. 15-18, *infra*.

The memorandum opinion and order of the United States District Court for the District of Colorado, dated March 14, 1989, has not been reported. It is reprinted in the Appendix hereto, pp. 19-20, *infra*.

The memorandum opinion and order of the United States Bankruptcy Court for the District of Colorado, dated July 14, 1988, has not been reported. It is reprinted in the Appendix hereto, pp. 21-29, *infra*.

The order of the United States District Court for the District of Colorado, dated April 26, 1985, has not been reported. It is reprinted in the Appendix hereto, pp. 30-33, *infra*.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. §§ 1303 and 1451, the Respondent brought suit in the United States District Court for the District of Colorado on December 30, 1983, seeking a judgment declaring the amendments to ERISA contained in the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1401, *et seq.*, to be unconstitutional. The Petitioners asserted a counterclaim under Sections 502 and 515 of ERISA, 29 U.S.C. §§ 1132 and 1145, through which they sought to collect the statutory withdrawal liability that had been assessed against the Respondent.

On July 14, 1988, the United States Bankruptcy Court for the District of Colorado entered an order which held that the Petitioners' claim against the Respondent was barred.

On March 14, 1989, the United States District Court for the District of Colorado entered an order affirming the order of the Bankruptcy Court.

Also, on March 14, 1989, the United States District Court for the District of Colorado granted the Respondent's motion for summary judgment and dismissed the Petitioners' counterclaim.

On the Petitioners' appeal, the Tenth Circuit, on April 23, 1990, entered a judgment and opinion affirming the District Court's orders.

The jurisdiction of this Court to review the opinion and judgment of the Tenth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Sections 515, 4218, 4221 and 4301 of ERISA, 29 U.S.C. §§ 1145, 1398, 1401 and 1451. The statutes are reprinted in the Appendix hereto, pp. 34-40, *infra*.

STATEMENT OF THE CASE

This matter presents the Court with a case in which both parties have asserted strong public policy arguments. The Respondent, Centric Corporation ("Centric")

contends that the efficient administration of the bankruptcy courts is the more important public policy and should control the resolution of this matter. The Petitioners contend, on the other hand, that the public policies underlying the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1001, *et seq.*, are of paramount importance and should, therefore, govern the outcome of this matter.

In 1983, the Trustees determined that Centric had completely withdrawn from the Centennial State Carpenters Pension Trust Fund ("Fund") and accordingly notified Centric, on April 7, 1983, that it had been assessed approximately $375,000 in statutory withdrawal liability. Centric did not make any of the required payments of withdrawal liability and also did not make any request for arbitration within the time limits set forth in Section 4221(a)(1) of ERISA, 29 U.S.C. § 1401(a)(1).

Subsequently, on December 30, 1983, Centric initiated a declaratory judgment action against the Trustees arguing that (1) the MPPAA was unconstitutional, and (2) Centric had not withdrawn from the Fund under the labor dispute exception set forth in Section 4218 of ERISA, 29 U.S.C. § 1398. Beyond a single sentence in the prayer for relief in its Complaint, Centric did not request the District Court to enter any order staying arbitration, and the District Court did not enter any order staying arbitration. The Trustees, in response to Centric's lawsuit, filed a counterclaim for collection of the assessed withdrawal liability of $372,775.00, plus interest, liquidated damages, attorneys' fees and costs and, on November 29, 1984, moved the District Court to compel Centric to make

interim payments of the withdrawal liability assessment during the pendency of the lawsuit. Thereafter, the parties, with approval of the District Court, agreed that Centric could post a surety bond in lieu of making interim withdrawal liability payments. Accordingly, on December 20, 1984, Centric posted a surety bond in the principal amount of $372,775.00, for the sole purpose of securing payment of the assessed withdrawal liability.

On April 26, 1985, Judge Moore of the District Court ruled that the MPPAA was constitutional. Sixty-eight days later, on July 3, 1985, Centric filed for protection from its creditors under Chapter 11 of the Bankruptcy Code.

On April 15, 1986, the Trustees filed a proof of claim with the Bankruptcy Court and also moved for relief from the automatic stay of Section 362 of the Bankruptcy Code, 11 U.S.C. § 362. The Trustees' motion was granted on May 13, 1986. On March 6, 1987, Centric gave notice that its bankruptcy reorganization plan had been confirmed with an effective date of April 15, 1987. On May 15, 1987, Centric filed an objection to some 165 claims, including the Trustees' claim. Centric objected to the Trustees' claim on the basis that the claim was contingent upon pending litigation. The notice under local Bankruptcy Rule 23 also advised creditors that those who wished to respond to Centric's objections were required to do so by no later than June 29, 1987.

The Trustees did not respond to Centric's objection until January 29, 1988, when their present counsel moved to reopen the District Court proceedings and also, since the Bankruptcy Court had not entered any order ruling on Centric's objection to the Trustees' proof of claim,

filed, in the Bankruptcy Court, a motion for leave to respond to Centric's objection and tendered a response.

On June 29, 1988, the Bankruptcy Court entered an order, effective *nunc pro tunc* August 10, 1987, which denied the Trustees' Motion to File a Response to the Debtor's Objection to Claims. The Bankruptcy Court's order was based on the finding that the Trustees' former legal counsel had failed to file a timely response to Centric's objection to the Trustees' claim in the bankruptcy case. The Trustees appealed the Bankruptcy Court decision to the District Court.

On March 14, 1989, the District Court entered two rulings. In the first ruling, the District Court upheld the Bankruptcy Court's decision of June 29, 1988. In the second ruling, on Centric's cross motion for summary judgment, the District Court held that the Trustees' claims against Centric and the bonding company were barred under the doctrine of laches. On March 28, 1989, the Trustees filed their appeals of the March 14, 1989 orders. The two appeals were consolidated and on April 23, 1990, the Tenth Circuit issued its decision which affirmed both decisions of the District Court.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's Decision, That an Employer Which Fails to Arbitrate a Withdrawal Liability Assessment Does Not Waive All Defenses to a Withdrawal Liability Assessment, Is Incorrect and Contrary to ERISA.

A principal reason Congress enacted ERISA was to ensure that workers and their beneficiaries would not be

deprived of retirement benefits by the termination of pension plans before sufficient funds had been accumulated in the plans. *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 720 (1984). In 1980, Congress amended ERISA and, in recognition of the growing problem of insolvencies of multiemployer pension plans, enacted the MPPAA. Prior to the enactment of the MPPAA, employers could easily withdraw from multiemployer pension plans, leaving them "starving for funds." *Carl Colteryahn Dairy, Inc. v. Western Penn. Teamsters and Employers Pension Fund*, 847 F.2d 113, 116 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 865 (1989). *See also I.A.M. Nat'l Pension Fund v. Clinton Engines Corp.*, 825 F.2d 415, 416 (D.C. Cir. 1987). Through enactment of ERISA and the MPPAA, Congress implemented a policy strongly favoring the protection and preservation of employee retirement benefits.

The legislative intent of Congress and the purpose of the MPPAA are clear and unambiguous:

> Because delinquencies of employers in making required contributions are also a serious problem for many multiemployer plans, we wish to make clear the public policy in this area, which this bill is intended to further. Failure of employers to make promised contributions in a timely fashion imposes a variety of costs upon plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys' fees and other legal costs arise in connection with collection efforts.

> These costs detract from the ability of plans to formulate or meet funding standards and adversely effect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. Moreover, in the context of this legislation, uncollected delinquencies can add to the unfunded liability for all employers. Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation.
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Mangan v. Owens Truckmen, Inc., 715 F. Supp. 436, 441 (E.D.N.Y. 1989) (quoting remarks of Rep. Thompson, 126 *Cong. Rec.* 23039 (August 25, 1980)).

This case is precisely the type of case that Congress had in mind when it enacted the MPPAA and presents a graphic example of the issues of delay, expense and protracted proceedings which Congress sought to avoid by requiring arbitration of disputes over withdrawal liability assessments.

Through enactment of ERISA and the MPPAA, Congress implemented a policy strongly favoring the protection and preservation of employees' retirement benefits. Under the circumstances of this case, this strong policy clearly outweighs the policy of quick and efficient administration of bankrupts' estates. *See Katchen v. Landy*, 382 U.S. 323 (1966) (chief purpose of the bankruptcy laws is to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited

period). The Trustees are seeking to collect the assessed amount of withdrawal liability from a surety bond which is not an asset of the bankruptcy estate, *see In re Mansfield Tire and Rubber Co.*, 660 F.2d 1108, 1115 (6th Cir. 1981), and which was posted for the sole purpose of securing Centric's liability for the payment of the withdrawal liability assessment. Therefore, the policy consideration of efficient administration of bankrupts' estates must give way to the policies underlying the MPPAA.

Section 4221(a)(1) of ERISA, 29 U.S.C. § 1401(a)(1), states, in pertinent part:

> Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration. Either party may initiate the arbitration process within a 60-day period after the earlier of –
>
> (A) the date of notification to the employer under section 1399(b)(2)(B) of this title, or
>
> (B) 120 days after the date of the employer's request under section 1399(b)(2)(A) of this title.

Section 4221(b)(1) of ERISA, 29 U.S.C. § 1401(b)(1) states, in pertinent part:

> If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

The consequences of an employer's failure to comply with Section 4221 of ERISA are harsh. If an employer fails

to arbitrate as required by Section 4221, then the amount of withdrawal liability assessed by the plan sponsor is "due and owing" and the employer may not assert any defenses to collection of the withdrawal liability assessment.

In *I.A.M. Nat'l Pension Fund v. Clinton Engines Corp.*, 825 F.2d 415 (D.C. Cir. 1987), the court overturned a trial court ruling in favor of an employer and held that "[t]he unequivocal import of Section 1401 is that all cases – even those involving no disputed facts – should proceed initially to arbitration." *Id.* at 422. In summarizing its decision, the court found that the employer had failed to make a timely request for arbitration and had thereby waived its right to assert any defenses to the claim for collection of withdrawal liability. The court stated:

> In short, arbitration reigns supreme under the MPPAA. And the consequences of failing to arbitrate . . . are clearly enunciated by the statute. Section 1401(b) provides, in pertinent part "If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor . . . shall be due and owing on the schedule set forth by the plan sponsor."

Id. at 422.

The duty to arbitrate is not discretionary. As the Ninth Circuit stated:

> the duty to arbitrate [arises] not from an agreement of the parties, but from the statute. The matters to be resolved by arbitration are not to be determined by the parties' intention, but by the intention of Congress. . . . [T]he statute states unambiguously that "[a]ny dispute between an employer and the plan sponsor . . .

> concerning a determination made under sections 1381 through 1399 . . . shall be resolved through arbitration," and Congress clearly intended exactly what those words import.

Teamsters Pension Trust Fund v. Allyn Transp. Co., 832 F.2d 502, 505-06 (9th Cir. 1987). *See also ILGWU Nat'l Retirement Fund v. Levy Bros. Frocks, Inc.*, 846 F.2d 879 (2d Cir. 1988).

Despite the unambiguous language of ERISA, the circuit courts are currently split over the issue of whether the failure of an employer to timely initiate arbitration after it has been assessed withdrawal liability waives *all* of the employer's defenses to the withdrawal liability assessment. This Court has not previously ruled on the consequences of an employer's failure to seek arbitration of a withdrawal liability assessment and should do so now in order to clarify the growing confusion and divergence of approach of the circuit courts.

The District of Columbia, Third, Sixth, Seventh and Ninth Circuits have all adopted the position, as set forth in the plain terms of the statute, that when an employer fails to *initiate* arbitration, the employer waives all defenses to the plan sponsor's withdrawal liability claim. *See I.A.M. Nat'l Pension Fund v. Clinton Engines Corp.*, 825 F.2d 415 (D.C. Cir. 1987); *Grand Union Co. v. Food Employers Labor Relations Ass'n*, 808 F.2d 66 (D.C. Cir. 1987); *Flying Tiger Line v. Teamsters Pension Trust Fund of Philadelphia*, 830 F.2d 1241 (3d Cir. 1987) (issue of whether a corporate entity is an employer must be resolved through arbitration); *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118 (3d Cir. 1986) (employer must *request* arbitration); *Mason and Dixon Tank Lines, Inc.*

v. Central States, Southeast and Southwest Areas Pension Fund, 852 F.2d 156 (6th Cir. 1988); *Robbins v. Chipman Trucking, Inc.*, 866 F.2d 899 (7th Cir. 1988); *Robbins v. Admiral Motor Freight, Inc.*, 846 F.2d 1054, 1055 (7th Cir. 1988); *Robbins v. B and B Lines, Inc.*, 830 F.2d 648 (7th Cir. 1987); *Teamsters Pension Trust Fund v. Allyn Transp. Co.*, 832 F.2d 502 (9th Cir. 1987); *Combs v. Leishman*, 691 F. Supp. 424 (D.D.C. 1988); *I.A.M. Nat'l Pension Fund v. Cullman Indus.*, 640 F. Supp. 1284 (D.D.C. 1986); *Combs v. Western Coal Corp.*, 611 F. Supp. 917 (D.D.C. 1985); *Combs v. Adkins and Adkins Coal Co., Inc.*, 597 F. Supp. 122, 127 (D.D.C. 1984); *New York State Teamsters Conference & Retirement Fund v. McNicholas Transp. Co.*, 658 F. Supp. 1469, 1475 (N.D.N.Y. 1987), *aff'd*, 848 F.2d 20 (2d Cir. 1988); *Western Fund v. F.C. Parsons, Inc.*, 5 E.B.C. 2277 (W.D. Wash. 1984).

The Second Circuit, as stated in *ILGWU Nat'l Retirement Fund v. Levy Bros. Frocks, Inc.*, 846 F.2d 879 (2d Cir. 1988), follows the rule that an employer must either initiate arbitration or seek judicial resolution within the arbitration time limits or face the harsh result of waiving all of its defenses to the withdrawal liability assessment.

A number of circuit courts, however, have created several exceptions to the statutory requirement of Section 4221(b) of ERISA, 29 U.S.C. § 1401(b), that an employer's failure to arbitrate results in a waiver of all defenses to a withdrawal liability assessment. The first exception is the constitutional challenge exception under which several courts have held that an employer which challenged the MPPAA on constitutional grounds did not have to arbitrate the withdrawal liability assessment during the period of time when the constitutional challenge was

pending. *See, e.g., Marvin Hayes Lines v. Central States, Southeast and Southwest Areas Pension Fund*, 814 F.2d 297 (6th Cir. 1987); *Republic Indus. v. Central Pennsylvania Teamsters Pension Fund*, 693 F.2d 290 (3d Cir. 1982). The constitutional challenge case law developed in the early 1980s, and was used by employers to defend against withdrawal liability assessments. As the constitutionality of the MPPAA has been consistently upheld, *see Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), the constitutional challenge exception has largely become moot.

The second exception to the failure to arbitrate rule is the irreparable injury exception under which some circuit courts have required a showing that the judicial remedy is inadequate and the time necessitated by the arbitration process would cause irreparable injury to the employer. *See Republic Indus. v. Central Pennsylvania Teamsters Pension Fund*, 693 F.2d 290 (3d Cir. 1982).

The third exception is that an employer does not waive a defense the employer does not have available to it at the time of the withdrawal liability assessment if it fails to initiate arbitration within the statutory period. This exception has been followed by the Third and Tenth Circuits. *See Trustees of the Colorado Pipe Indus. Pension Trust v. Howard Electrical and Mechanical*, No. 88-2938 (10th Cir. May 18, 1990); *Trustees of the Centennial State Carpenters Pension Trust Fund v. Centric Corp.*, 901 F.2d 1514 (10th Cir. 1990); *Crown Cork & Seal Co. v. Central States Southeast and Southwest Areas Pension Fund*, 881 F.2d 11 (3d Cir. 1989).

The Tenth Circuit, in the instant case, held that an employer does not waive the defense of laches when it fails to initiate arbitration of a withdrawal liability assessment. Shortly after the *Centric* decision, however, a different panel of the Tenth Circuit held, in *Trustees of the Colorado Pipe Indus. Pension Trust v. Howard Electrical and Mechanical*, No. 88-2938 (10th Cir. May 18, 1990), that the failure of an employer to initiate arbitration within the statutory period waives all of the employer's defenses except those defenses, such as laches, which were unavailable to the employer at the time arbitration should have been initiated. The Tenth Circuit appears to be confused over the effect of an employer's failure to arbitrate a withdrawal liability assessment. On one hand, the Tenth Circuit has held that certain defenses may be available to employers, while, on the other hand, the Tenth Circuit has also held that the only defense available to an employer is a defense, such as laches, which an employer did not have available at the time of the withdrawal liability assessment. This reasoning leads to the anomalous result that a withdrawn employer is allowed to assert a defense to the withdrawal liability assessment even though the statute provides for a waiver of all defenses in such circumstances.

Centric did not initiate or even request arbitration over the Trustees' withdrawal liability assessment within the time period set forth in Section 4221(a)(1) of ERISA, 29 U.S.C. § 1401(a)(1). Centric initiated the underlying lawsuit before the expiration of the period set forth in Section 4221(a)(1); however, Centric did not request or initiate arbitration within sixty days of the date on which

the District Court rejected Centric's constitutional challenges to the MPPAA.

Assuming, *arguendo*, that Centric's constitutional challenges stayed the period within which Centric was otherwise required to initiate arbitration, the District Court's decision initiated a new period within which Centric was required to initiate arbitration.[1] Once the constitutional challenges were ruled on, the only remaining issue was whether the labor dispute exception to withdrawal liability existed. An employer's assertion of the labor dispute exception creates a factual issue which should be arbitrated. *New York State Teamsters Conference Pension & Retirement Fund v. McNicholas Transp. Co.*, 848 F.2d 20 (2d Cir. 1988); *Coles Express v. New England Teamsters and Trucking Industry Pension Fund*, 702 F. Supp. 355 (D. Me. 1988). There are other authorities which have held that by claiming the labor dispute exception, an employer can alleviate its obligation to arbitrate a withdrawal liability assessment. Those cases, however, are distinguishable from the instant case, where the arguable labor dispute ceased to exist when the bankruptcy became a Chapter 11 liquidation. *See, e.g., Sheet Metal Workers' Pension Fund v. Advanced Metal and Welding Corp.*, 654 F. Supp. 219 (N.D. Ga. 1986). Even under the line of cases of which *Advanced Metal* is representative, Centric, by failing to take any action at all to even request, much

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[1] Centric's bankruptcy did not toll the period of time within which Centric was required to initiate arbitration. *I.A.M. Nat'l Pension Fund v. Slyman Indus., Inc.*, 901 F.2d 127 (D.C. Cir. 1990). *Cf. Trustees of the Chicago Truck Drivers, Helpers and Warehouse Workers Union Pension Fund v. Central Transp., Inc.*, 888 F.2d 1161 (7th Cir. 1989).

less initiate, arbitration within sixty days from the date of the District Court's order, waived its right to contest the Trustees' assessment of withdrawal liability. *See* Section 4221(b)(1) of ERISA, 29 U.S.C. § 1401(b)(1). Accordingly, the labor dispute exception of Section 4218(2) of ERISA, 29 U.S.C. § 1398(2), has no application to this case.

The Trustees are not asking the Court to decide whether a constitutional challenge to the MPPAA tolls the running of the period within which an employer can initiate arbitration. The Court does not have to reach that issue since Centric failed to take any action at all to initiate arbitration after the District Court rejected Centric's constitutional challenge. Rather, the Trustees are asking the Court to clarify the growing split among the circuits on the issue of whether an employer which fails to initiate arbitration in a timely manner waives all defenses to a withdrawal liability assessment as is contemplated in Section 4221(b) of ERISA, 29 U.S.C. § 1401(b), or whether an employer, even though it has failed to initiate arbitration, may nevertheless assert defenses to an action for collection of withdrawal liability.

The Trustees' position is simple: By failing to initiate arbitration in a timely manner following the District Court's rejection of its constitutional challenge, Centric waived its ability to challenge the Trustees' withdrawal liability assessment, *Robbins v. Chipman Trucking, Inc.*, 866 F.2d 899 (7th Cir. 1988); *T.I.M.E.-DC, Inc. v. Management-Labor Welfare & Pension Funds*, 756 F.2d 939 (2d Cir. 1985), and waived its right to assert any defense. By operation of statute, the amount of the Trustees' assessment became "due and owing" and not subject to further challenge.

Section 4221(b)(1) of ERISA, 29 U.S.C. § 1401(b)(1). *See Centennial State Carpenters Pension Trust Fund v. Woodworkers of Denver, Inc.*, 615 F. Supp. 1063, 1068-69 (D. Colo. 1985). *See also Robbins v. Chipman Trucking, Inc.*, 693 F. Supp. 628 (N.D. Ill. 1986), *aff'd*, 866 F.2d 899 (7th Cir. 1988).

II. The Tenth Circuit Applied an Erroneous Burden of Proof on the Defense of Laches.

The Tenth Circuit held that the Trustees had not met their burden of proof in proving that the Trustees' claims were not barred under the doctrine of laches. In contravention of Supreme Court and circuit court precedent, the Tenth Circuit erroneously placed the burden of proof on the Trustees, rather than on Centric, the party that asserted the doctrine of laches as a defense. *Centric*, Appendix p. 13.

This Court has previously ruled that "[l]aches within the term of the statute of limitations is no defense at law." *United States v. Mack*, 295 U.S. 480, 489 (1935). This is especially true where, as in this case, Congress has explicitly created a limitations period for enforcement of a right which it created. In such a case, "the Congressional statute of limitations is definitive." *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946).

The Trustees brought their action for collection of withdrawal liability within the specific statute of limitations established by Section 4301(f) of ERISA, 29 U.S.C. § 1451(f). Tenth Circuit held, however, that "laches and a statute of limitations are not mutually exclusive, even when the statute has been made specifically applicable to the claim and the claim was brought within the statutory period." *Centric*, Appendix p. 11, n.4. The Tenth Circuit

erroneously applied the doctrine of laches, an equitable theory, to the Trustees' statutory claim.

In a similar situation, the Second Circuit held that laches is not a defense to a federal government lawsuit which was filed in a timely manner under the False Claims Act, 31 U.S.C. § 231, *et seq. United States v. RePass*, 688 F.2d 154 (2d Cir. 1982). Similarly, the Ninth Circuit, held in *Straley v. Universal Uranium and Milling Corp.*, 289 F.2d 370 (9th Cir. 1961), that laches was not a bar to an action timely brought under the Securities Act of 1933, 15 U.S.C. §§ 77e and 77l(1), which provided its own statute of limitations in 15 U.S.C. § 77m.

The Sixth and Eighth Circuits have adopted an intermediate approach whereby a claim that has been brought within the applicable statute of limitations creates a presumption against laches which must be rebutted by the party claiming laches. *See Tandy Corp. v. Malone & Hyde, Inc.*, 769 F.2d 362 (6th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986); *Azalea Fleet, Inc. v. Dreyfus Supply & Mach. Corp.*, 782 F.2d 1455 (8th Cir. 1986); *Hurst v. U.S. Postal Service*, 586 F.2d 1197 (8th Cir. 1978).

In *Tandy*, the Sixth Circuit aptly recognized that the general principle in laches cases is that, "in the absence of unusual circumstances, a suit will not be barred before the analogous statute has run. . . . " *Tandy*, 769 F.2d at 365. The court reasoned that use of the statute of limitations as the laches period "enhances the stability and clarity of the law by applying neutral rules." *Id.*

The Eighth Circuit has also considered an analogous statute of limitations as "one factor to be weighed in a determination of [the laches' elements of] unreasonable

delay and prejudice." *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 805 (8th Cir. 1979), *cert. denied*, 446 U.S. 913 (1980).

Other courts have gone further and held that where the statute of limitations applies to bar an action, the laches defense is unavailable. *United States v. Olin Corp.*, 606 F. Supp. 1301 (N.D. Ala. 1985); *City and County of Honolulu v. Haw. Newspaper Agency Inc.*, 559 F. Supp. 1021 (D. Haw. 1983). *Cf. Smith v. Industrial Employers & Distributors Ass'n*, 385 F. Supp. 1281, 1287 (N.D. Cal. 1974), *aff'd*, 546 F.2d 314 (9th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); *Davis v. Alabama Power Co.*, 383 F. Supp. 880, 894 (N.D. Ala. 1974), *aff'd*, 542 F.2d 650 (5th Cir. 1976), *aff'd*, 431 U.S. 581 (1977).

Several courts have held that analogous statutes of limitations are afforded great weight in determining whether a claim is barred by laches. *Small v. Badenhop*, 701 P.2d 647 (Haw. 1985); *Adams v. Jankouskas*, 452 A.2d 148 (Del. Supr. 1982), and that where a party's rights are not barred by the applicable statute of limitations, they will not be barred by laches absent special or extraordinary circumstances or a change in circumstances. *See, e.g., State ex rel. General Electric Co. v. Gaertner*, 666 S.W.2d 764 (Mo. 1984); *Thirty-Four Corp. v. Sixty-Seven Corp.*, 15 Ohio St.3d 350, 474 N.E.2d 295 (Ohio 1984); *Weaver v. Watson*, 85 Ill. Dec. 799, 474 N.E.2d 759 (Ill. App. 1984).

In this case, the Trustees' moved to reopen their withdrawal liability lawsuit well within the statute of limitations set forth in Section 4301(f) of ERISA, 29 U.S.C. § 1451(f) (six year statute of limitations). The Trustees' action for the collection of withdrawal liability is an

action at law. Neither the District Court nor the Bankruptcy Court found that there were special or extraordinary circumstances, nor any bad faith on the part of the Trustees, which justified disregarding the statute of limitations. Therefore, the doctrine of laches should not have been applied to bar the Trustees' action and the Tenth Circuit effectively disregarded Supreme Court and other decisions in placing the burden of proof on that issue on the Trustees.

III. The Tenth Circuit Incorrectly Held That the Equitable Doctrine of Laches Could Be Used by an Employer to Prevent Pension Fund Trustees from Collecting Withdrawal Liability.

In *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), this Court held that only a limited number of defenses are available to an employer which is sued by trustees of multiemployer employee benefit plans for collection of delinquent fringe benefit contributions. Specifically, this Court held that the only defense available to an employer in such a case is illegality of the underlying collective bargaining agreement. As set forth below, since *Kaiser Steel*, the circuits have begun to create exceptions to the general rule that an employer may assert no defenses to a claim for collection of delinquent fringe benefit contributions.

In *Kaiser Steel*, this Court considered the intent of Congress, in enacting Section 515 of ERISA, 29 U.S.C. § 1145, to substantially narrow the defenses that an employer can assert to an action for collection of delinquent contributions. Congress intended the same rules to apply to actions for collection of withdrawal liability as apply to actions for collection of delinquent fringe benefit contributions. *See* Section 4301(b) of ERISA, 29 U.S.C.

§ 1451(b), which provides that an action to collect withdrawal liability is to be "treated in the same manner" as an action to collect delinquent contributions under Section 515 of ERISA, 29 U.S.C. § 1145.

The legislative history of Section 515 of ERISA, 29 U.S.C. § 1145, indicates a clear Congressional intent to substantially narrow the range of defenses available to employers in suits by plan trustees to recover contractually required, but delinquent, contributions. *See Kaiser Steel*, 455 U.S. at 86-88. The circuit courts have consistently interpreted Section 515 of ERISA to eliminate virtually all defenses to an action for collection of delinquent fringe benefit contributions. *See, e.g. Washington Area Carpenters' Welfare Fund v. Overhead Door Co.*, 681 F.2d 1, 4-5 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 926 (1983); *National Stabilization Agreement of Sheet Metal Indus. Trust Fund v. Commercial Roofing & Sheet Metal*, 655 F.2d 1218 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 909 (1982) (allegation of a "structural defect" in the representation of employers in a joint labor management trust fund was not a defense which would allow an employer to withhold contributions); *Huge v. Long's Hauling Co.*, 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979) (union misconduct not a defense to a delinquent fringe benefit contribution collection action); *Southwest Administrators, Inc. v. Rozay's Transfer*, 791 F.2d 769 (9th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987) (neither fraud in the inducement nor duress allowed as defenses); *Southern California Retail Clerks Union and Fruit Employers Joint Pension Trust Fund v. Bjorklund*, 728 F.2d 1262, 1265-66 (9th Cir. 1984) ("a defense is properly allowable (only) when it relates to a promise to make contributions but is illegal"); *Board of*

Trustees, Container Mechanics Welfare/Pension Fund v. Universal Enterprises, Inc., 751 F.2d 1177 (11th Cir. 1985) (trustees' breach of fiduciary duty not a defense to a collection action); *Cf. Operating Engineers Pension Trust v. Gilliam*, 737 F.2d 1501 (9th Cir. 1984) (fraud in the execution of a collective bargaining agreement allowed as a defense toward delinquent fringe benefit contribution collection action).

Under the holdings of these cases, the equitable doctrine of laches is not a defense to a delinquent fringe benefit contribution collection action and, therefore, under Sections 4301(b) and 515 of ERISA, is also not a defense to an action for collection of withdrawal liability. Accordingly, the Tenth Circuit was incorrect when it determined that the doctrine of laches barred the Trustees from pursuing their withdrawal liability claim against the surety bond that had been posted by Centric.

CONCLUSION

For the reasons stated herein, this petition for certiorari should be granted.

Respectfully submitted,

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In re CENTRIC CORPORATION, Debtor.

TRUSTEES OF the CENTENNIAL STATE CARPENTERS PENSION TRUST FUND, Creditor-Appellant,

v.

CENTRIC CORPORATION, Debtor-Appellee,

U.S. Trustee, Trustee.

CENTRIC CORPORATION, Plaintiff-Appellee,

v.

TRUSTEES OF the CENTENNIAL STATE CARPENTERS PENSION TRUST FUND; and the Centennial State Carpenters Pension Trust Fund, Defendants-Appellants.

Nos. 89-1080, 89-1081.

United States Court of Appeals, Tenth Circuit.

April 23, 1990

Union pension fund brought action against employer to collect withdrawal liability. The United States District Court for the District of Colorado, Richard P. Matsch, J., affirmed bankruptcy court order denying relief and separately held that fund's claim was barred by doctrine of laches. On appeal from both orders, the Court of Appeals, Stephen H. Anderson, Circuit Judge, held that: (1) refusal to allow fund to file untimely opposition to debtor's objection to its proof of claim was not abuse of discretion, and (2) fund's suit was barred by doctrine of laches.

Affirmed.

Timothy J. Parsons (David B. Seserman with him on the briefs), Gorsuch, Kirgis, Campbell, Walker and Grover, Denver, Colorado, for defendants-appellants.

Kenneth R. Stettner (Cynthia R. Hanley with him on the brief), Stettner, Miller and Cohn, P.C., Denver, Colorado, for plaintiff-appellee.

Before McKAY, BARRETT, and ANDERSON, Circuit Judges.

STEPHEN H. ANDERSON, Circuit Judge.

The Trustees of the Centennial State Carpenters Pension Trust Fund ("the Trustees") appeal two orders of the district court. We affirm both.

BACKGROUND

On April 7, 1983, the Trustees notified Centric Corporation ("Centric") that Centric had been found to have withdrawn from the Centennial State Carpenters Pension Trust Fund and was therefore accountable for withdrawal liability under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), in the amount of $372,775. *See* R. Vol. I at Tab 4, Ex. A. The MPPAA requires disputes between a plan sponsor and an employer to be resolved through arbitration, which either party must initiate within 180 days of a request by the employer that the sponsor review specific matters (which must be made within 90 days of the notice), or within 60 days of the sponsor's response to such a request, whichever comes first. 29 U.S.C. §§ 1399(b)(2), 1401(a)(1). If

arbitration is not properly initiated, the assessed liability becomes "due and owing." 29 U.S.C. § 1401(b)(1).

On April 29 and July 6, 1983, Centric asked the Trustees to review certain alleged errors in the assessment. When the Trustees did not respond, Centric on December 30, 1983[1] filed suit seeking a declaratory judgment that portions of the MPPAA, including the arbitration requirement, were unconstitutional. The complaint also alleged that, even if the MPPAA was constitutional, Centric had incurred no withdrawal liability because of the exception in 29 U.S.C. § 1398 for suspensions caused by labor disputes. The Trustees counterclaimed for the assessed withdrawal liability. Centric posted a bond sufficient to pay the assessment. In April 1985, the district court ruled against Centric's constitutional claims but held that the applicability of the labor dispute exception could not be determined on a motion for summary judgment.

In July 1985, Centric filed a bankruptcy petition. The district court consequently stayed its proceedings and terminated the litigation without prejudice. The Trustees filed a proof of claim in the bankruptcy court for the assessed withdrawal liability, and moved for relief from

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[1] Both the April 29 letter and the July 6 letter came within 90 days of the notice of liability. December 30 is 225 days after April 29 and 177 days after July 6, so the question of whether Centric could have timely initiated arbitration on December 30 depends upon whether the 180-day period began with the first letter or the second letter. Because we dispose of the case on different grounds, we need not consider this question.

the automatic stay. The motion was granted on May 13, 1986.

In May 1987, Centric objected to a number of the claims filed against it, including the Trustees' claim. Pursuant to a local bankruptcy rule,[2] each party to whose claim Centric objected was notified that if the creditor

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[2] "Whenever an order is to be entered or other action is to be taken after 'notice and a hearing,' . . . :

. . . .

(f) The notice shall state the date action will be taken in the absence of an objection and request for a hearing by an interested party. The notice shall also state that the interested party must file an objection and request a hearing on or before a date certain which shall be no less than four (4) days prior to the date the intended action is to occur.

(g) Objections and requests for hearing shall be filed with the Court . . . [and] shall clearly specify the grounds upon which they are based, including the citation of supporting legal authority, if any. General objections will not be considered."

D. Colo. Bankr. R. 23(f), (g).

While this procedure for responding to objections to proofs of claim is not mandated by the Bankruptcy Code or the federal Bankruptcy Rules, it does not conflict with them, so the Trustees are not excused from it. *See* Bankr. R. 9029; 1 D. Cowans, *Bankruptcy Law and Practice* § 3.17, at 251 (citing *Smith v. Ford Motor Co.*, 626 F.2d 784, 791 (10th Cir. 1980), *cert. denied*, 450 U.S. 918, 101 S.Ct. 1363, 67 L.Ed.2d 344 (1981)). Also, because the local rule makes no distinction between contingent and non-contingent claims, we need not address the Trustees' argument that they were not required to file a proof of claim because the liability was fixed.

opposed the objection, a written request for a hearing had to be filed by June 22, 1987 or the bankruptcy court would act on the objection on June 29, 1987. The Trustees admit that they received their notice. Brief of Appellant at 14. Many creditors responded, but not the Trustees. On August 10, 1987, the bankruptcy court resolved the claims of the creditors who responded. The bankruptcy court then approved a plan under which all of Centric's assets would go to its secured creditors, after which the company would be dissolved. The unsecured creditors, including the Trustees, were to receive nothing from the bankruptcy estate.

Sometime between June 1986 and January 1988 (the record does not permit greater specificity), the Trustees changed legal counsel. On January 29, 1988, the Trustees, through their new attorney, filed a motion in the district court to reopen those proceedings and a motion in the bankruptcy court for leave to respond to Centric's objection to the Trustees' claim. The district court granted the motion to reopen. On July 14, 1988, the bankruptcy court, which had not formally ruled upon Centric's objection to the Trustees' claim, denied the Trustees' motion to respond to Centric's objection, and disallowed their claim.[3] The Trustees appealed to the district court, which

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[3] In their brief, the Trustees state that the bankruptcy court announced these decisions on June 29, 1988, in an order effective *nunc pro tunc* August 10, 1987 (the date of the hearing on the claims of the creditors who responded to Centric's objections). The court did issue an order *nunc pro tunc* on June 29, but that order did not deal with the Trustees' claim. It disallowed the claims of the *other* creditors who did not timely respond. The June 29 order is completely irrelevant to the Trustees' claim.

affirmed the bankruptcy court's decision. In a separate order, the district court held that the Trustees' withdrawal liability claim was barred by the doctrine of laches. The Trustees appeal both orders.

DISCUSSION

I. AFFIRMANCE OF THE BANKRUPTCY COURT

The Trustees were notified that if they opposed Centric's objection to their proof of claim, a written opposition and request for a hearing had to be filed by June 22, 1987. Yet, the Trustees did not try to respond until January 29, 1988 – seven months after their opposition was due. The bankruptcy court denied their motion:

> "This Court is convinced that if it were to allow the response of the Trust Fund to the Debtor's Objection to Claims, which was extremely tardy and which was the product of what is admitted to be simple oversight and neglect, then further unnecessary delay, cost, and disruption to the case is assured. . . .
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> . . . .
>
> To grant the Motion to Respond will, inevitably, cause continuing confusion in an already disputed bankruptcy case, further dissipate an estate already inadequate to allow distribution to unsecured creditors, and send a message to creditors and the bar alike that schedules, timelines, and bar dates are not of importance in bankruptcy proceedings."

R. Vol. III, Tab 18 at 3-4.

A bankruptcy court may allow a party to act tardily when the failure to act in a timely manner "was the result of excusable neglect." Bankr. R. 9006(b)(1). Courts "have generally not been liberal in granting [such] motions. . . ."

9 L. King, *Collier on Bankruptcy* ¶ 9006.06, at 9006-16 (15th ed. 1989). The court's decision on a Rule 9006(b) motion shall be reversed only for an abuse of discretion. *In re Int'l Coating Applicators, Inc.*, 647 F.2d 121, 124 (10th Cir. 1984).

The bankruptcy court tested the Trustees' claim of excusable neglect against the factors identified as relevant by the Ninth Circuit in *In re Magouirk*, 693 F.2d 948 (9th Cir. 1982):

> "(1) whether granting the delay will prejudice the debtor, (2) the length of the delay and its impact on efficient court administration, (3) whether the delay was beyond the reasonable control of the person whose duty it was to perform, (4) whether the creditor acted in good faith, and (5) whether the clients should be penalized for their counsel's mistake or neglect."

Id. at 951.

Regarding the first factor, the court found that allowing the Trustees to raise their response to Centric's opposition to their claim after a seven-month delay would prejudice Centric because the debtor was on the verge of executing its plan of liquidation. The effect on a plan which was prepared before the creditor made its motion is a valid consideration under this factor. *See In re Standard Metals Corp*, 48 B.R. 778, 782 (D. Colo. 1985); *cf. In re Dix*, 95 B.R. 134, 138 (9th Cir. BAP 1988). Further proceedings in the bankruptcy court would both disrupt and diminish the distribution of the estate to Centric's creditors by requiring time and money to litigate the Trustees' claim. Centric would indeed have been prejudiced by the

resurrection of litigation in its almost-completed bankruptcy proceeding.

The court held that the second factor weighed against the Trustees because delaying the termination of the proceeding would add to the congestion currently plaguing the Bankruptcy Court for the District of Colorado. A delay which hinders "the objective of finality which the fixing of a bar date seeks to establish" has an adverse impact on efficient court administration. *In re Standard Metals Corp.*, 48 B.R. at 788. The premium on finally disposing of a matter is especially high when the court's docket is already overcrowded.

The third *Magouirk* factor – whether the delay was within the creditor's reasonable control – has been interpreted as simply asking whether the creditor had knowledge of his duties. *See id.* at 789; *In re Dix*, 95 B.R. at 138-39; *In re Figueroa*, 33 B.R. 298, 302 (Bankr. S.D.N.Y. 1983). Because the Trustees received notice of the deadline, it was within their reasonable control to respond promptly.

The bankruptcy court decided that these three factors weighed so "substantial[ly] and compelling[ly]" against the Trustees' motion that, even assuming that the last two factors mitigated in favor of the motion, relief would not be granted. R. Vol III, Tab 18 at 5. A similar conclusion was reached in *In re Standard Metals Corp.*, 48 B.R. at 789. Moreover, because the Trustees were an unsecured creditor, they would not have collected anything on their claim anyway, so they lost very little (if anything) by being denied the opportunity to respond belatedly to Centric's

objection to their claim. The district court correctly determined that the bankruptcy court did not abuse its discretion when it denied the Trustees' motion.

II. DISMISSAL OF THE TRUSTEES' COUNTERCLAIM

A. *Laches Is Not Waived by a Failure to Timely Initiate Arbitration*

Under the MPPAA, "[a]ny dispute between an employer and the plan sponsor of a multiemployer plan *concerning a determination* [of withdrawal liability] shall be resolved through arbitration." 29 U.S.C. § 1401(a)(1) (emphasis added). "If no arbitration proceeding has been initiated pursuant to [section 1401(a)(1)], the amounts demanded by the plan sponsor . . . shall be due and owing . . . [and the sponsor] may bring an action . . . for collection." 29 U.S.C. § 1401(b)(1). Defenses which should be referred to arbitration are waived by a failure to timely initiate arbitration (unless some exception to the exhaustion-of-remedies doctrine applies). *Central States Pension Fund v. Skyland Leasing Co.*, 691 F. Supp. 6, 14 (W.D. Mich. 1987); *New York State Teamsters Conference Pension & Retirement Fund v. McNicholas Transp. Co.*, 658 F. Supp. 1469, 1475 (N.D.N.Y. 1987), *aff'd*, 848 F.2d 20 (2d Cir. 1988).

The Trustees argue that this rule bars Centric from raising *any* defense to their withdrawal liability claim, but the MPPAA only requires arbitration of disputes "concerning" an assessment of withdrawal liability. Generally, therefore, the only defenses which are waived by a failure to timely initiate arbitration are those which go to the merits of the liability assessment itself. *See, e.g., Carl*

Colteryahn Dairy v. Western Pa. Teamsters & Employers Pension Fund, 847 F.2d 113, 118 (3d Cir. 1988) ("how and when withdrawal liability is to be assessed"); *Teamsters Pension Trust Fund v. Allyn Transp. Co.*, 832 F.2d 502, 506 (9th Cir. 1987) (" 'the establishment or amount of withdrawal liability' " (quoting *Shelter Framing Corp. v. Pension Benefit Guaranty Corp.*, 705 F.2d 1502, 1509 (9th Cir. 1983), *rev'd on other grounds sub nom. Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984))); *T.I.M.E.-DC, Inc. v. Management-Labor Welfare & Pension Funds*, 756 F.2d 939, 945 (2d Cir. 1985) ("issues the resolution of which is necessary to calculate withdrawal liability"); *Central State Pension Fund v. Skyland Leasing Co.*, 691 F. Supp. at 14 ("the amount of liability assessed and the method of calculating such liability"); *see also Mason & Dixon Tank Lines, Inc. v. Central States Pension Fund*, 852 F.2d 156, 164 (6th Cir. 1988). Laches in the prosecution of an action to collect the amount assessed is not such a defense, for it goes to the effect of the delay in bringing suit, not to the merits of the claim.

Moreover, a failure to arbitrate does not waive a defense that the employer does not yet have. *Crown Cork & Seal Co. v. Central States Pension Fund*, 881 F.2d 11, 16-17 (3d Cir. 1989); *see also, e.g., Central States Pension Fund v. 888 Corp.*, 813 F.2d 760, 764 (6th Cir. 1987); *Combs v. Leishman*, 691 F. Supp. 424, 429 (D.D.C. 1988). At the time the Trustees argue Centric should have initiated arbitration, the delay giving rise to the laches defense had not yet occurred.

Therefore, whether or not Centric's civil action tolled the time for initiating arbitration, Centric did not lose its right to claim that the Trustees were guilty of laches.

B. *The Trustees' Claim Was Barred By Laches*

The defense of laches is available in a suit to collect a claim for withdrawal liability. *See ILGWU Nat'l Retirement Fund v. Levy Bros. Frocks, Inc.* 846 F.2d 879, 887 (2d Cir. 1988); *Central States Pension Fund v. Lloyd L. Sztanyo Trust,* 693 F. Supp. 531, 541 (E.D. Mich. 1988); *Jaspan v. Certified Indus., Inc.,* 645 F. Supp. 998, 1007 (E.D.N.Y. 1985); *cf. Trustees of Wyo. Laborers Health & Welfare Plan v. Morgen & Oswood Constr. Co.,* 850 F.2d 613, 624 (10th Cir. 1988); *Trustees of Colo. Statewide Iron Workers Fund v. A & P Steel, Inc.,* 812 F.2d 1518, 1528 (10th Cir. 1987) (both considering a laches defense to a claim under ERISA for delinquent contributions to pension funds). *But see Robbins v. Pepsi-Cola Metro Bottling Co.,* 636 F. Supp. 641, 681 n.6 (N.D. Ill. 1986); *Combs v. Western Coal Corp.,* 611 F. Supp. 917, 920 (D.D.C. 1985).[4] The defense is available whether or not the amount assessed has become "due and owing." *See Jaspan v. Certified Indus., Inc.,* 645 F. Supp. at 1005. Laches is just as applicable to a delay in reinitiating litigation as it is to a delay in initiating litigation. *See Reinstatement (Second) of Judgments* § 20 comment n (1982); *cf. In re Whitney-Forbes, Inc.,* 770 F.2d 692, 698 (7th Cir. 1985);

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[4] These two district courts hold that a withdrawal liability claim cannot be barred by laches because the limitations period in the MPPAA, 29 U.S.C. § 1451(f), is the exclusive time bar for such a claim. In this circuit, however, laches and a statute of limitations are not mutually exclusive, even when the statute has been made specifically applicable to the claim and the claim was brought within the statutory period. *Armstrong v. Maple Leaf Apartments, Ltd.,* 622 F.2d 466, 472 (10th Cir. 1979), *cert. denied,* 449 U.S. 901, 101 S.Ct. 271, 66 L.Ed.2d 131 (1980).

Coleman v. Block, 663 F. Supp. 1315, 1329 (D.N.D. 1987), *vacated as moot*, 864 F.2d 604 (8th Cir. 1988).

After the district court terminated without prejudice the Trustees' counterclaim for withdrawal liability, the Trustees got the bankruptcy court to lift the automatic stay on May 13, 1986. However, it was not until January 29, 1988 – over twenty months later – that the Trustees moved to reopen the district court litigation. The district court held that the claim had become barred by laches:

> "[D]espite the issuance of the order granting relief from stay, thereby permitting the [T]rustees to prosecute their counterclaim in this civil action, the [T]rustees' former legal counsel decided to proceed through the proof of claim filed in the bankruptcy proceedings and then neglected to prosecute that claim in a timely manner. Current counsel for the [T]rustees then discovered that . . . a bond had been posted in this civil action to secure payment of withdrawal liability. . . . Accordingly, the [T]rustees seek to recover on that bond. . . . [T]he failure of the [T]rustees to prosecute the counterclaim here for more than 20 months after receiving the order granting relief from stay is inexcusable and would cause substantial detriment to the plaintiff by proceeding with the litigation of the counterclaim."

R. Vol. I, Tab 20 at 3.

"Laches consists of two elements: (1) inexcusable delay in instituting a suit; and (2) resulting prejudice to defendant from such delay." *Brunswick Corp. v. Spinit Reel Co.*, 832 F.2d 513, 523 (10th Cir. 1987). We will not disturb a finding of laches unless the district court abused its discretion. *Id.*

The Trustees claim that, rather than sleeping on their rights, their counsel spent the twenty-month interval trying to work out an amicable settlement. Generally, a delay caused by settlement negotiations is not unreasonable. *See e.g., Stone v. Williams*, 873 F.2d 620, 625 (2d Cir. 1989); *Mogavero v. McLucas*, 543 F.2d 1081, 1083 (4th Cir. 1976). Unfortunately for the Trustees, this argument appears to be an afterthought. No evidence in the record supports it.[5] We agree with the district court's conclusion that the Trustees have not justified their failure to act.

When the plaintiff's conduct is unjustified, the defendant's need to show prejudice eases. *Stone v. Williams*, 873 F.2d at 625; *see Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 893 (D.C. Cir. 1982). Centric need not show that the delay hindered its defense of the Trustees' claim; prejudice also can flow from outside conditions (in this case, arrangements to liquidate) arising during the hiatus. *See, e.g., Lingenfelter v. Keystone Consol. Indus., Inc.*, 691 F.2d 339, 342, (7th Cir. 1982); *Independent Bankers Ass'n v. Heimann*, 627 F.2d 486, 488 (D.C. Cir. 1980). The same prejudice to Centric that the bankruptcy court found under the first *Magouirk* factor also accrued to Centric from the Trustee's languor in the district court. Further litigation of the Trustees' claim would force Centric to revise its plan of liquidation, would both delay and reduce the ultimate payments to the secured creditors. We cannot say that the district court's conclusion that Centric was prejudiced was an abuse of its discretion.

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[5] In fact, the only relevant evidence is an affidavit from Centric's attorney averring that the last settlement discussions took place in 1985. *See* R. Vol. I, Tab 18 at Ex. 1.

CONCLUSION

The district court committed no reversible error. It correctly concluded that the bankruptcy court acted within its discretion when it denied the Trustees leave to respond tardily to Centric's objection to their claim. Nor did the district court abuse its discretion by holding the Trustees' withdrawal liability claim barred by laches, a defense available to Centric even if the time for arbitrating disputes concerning the liability assessment has passed. Both judgments of the district court are AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 83-M-2510

CENTRIC CORPORATION,

Plaintiff,

v.

CENTENNIAL STATE CARPENTERS PENSION TRUST FUND, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

MATSCH, Judge

This civil action was commenced on December 30, 1983, as Civil Action No. 83-JM-2510. By the complaint, the plaintiff, Centric Corporation (Centric), sought to avoid withdrawal liability under the Employee Retirement Income Security Act of 1974 (ERISA), as amended by the Multi-Employer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. § 1381, *et seq.* The grounds asserted were that the MPPAA's withdrawal liability provisions were unconstitutional and that the plaintiff had not withdrawn because of the labor dispute exception set forth in Section 1398. On April 26, 1985, Judge Moore denied the plaintiff's motion for summary judgment, ruling that there was no merit to the plaintiff's claim of unconstitutionality and that there were disputed factual questions in the claim of the labor dispute exception. Centric filed a Chapter 11 bankruptcy petition, Case No. 85-B-03769G in this district on July 3, 1985, and on

August 14, 1985, the plaintiff filed a motion for stay of these proceedings pursuant to the automatic stay provisions in 11 U.S.C. § 362(a). This court entered its order for a stay of these proceedings on August 16, 1985, vacating the trial date of October 28, 1985, and directing that the Clerk administratively terminate this action, without prejudice, and with leave to any party to reopen on a showing of good cause. The trustees filed a proof of claim in the bankruptcy proceedings on April 15, 1986, claiming withdrawal liability of $372,775. On May 15, 1987, Centric, as debtor, filed an objection to that and other claims with a notice, pursuant to Local Bankruptcy Rule 23, that any party opposing the objections must file a written request for a hearing on or before June 22, 1987.

On May 13, 1986, the bankruptcy judge granted the trustees' motion for relief from stay by an order which expressly allowed the trustees to reopen these proceedings in this court. The trustees did not file their motion to reopen this case until January 29, 1988, and Chief Judge Finesilver entered an order to reopen the case on February 8, 1988. The case was then reassigned and became Civil Action No. 83-M-2510.

After a status conference on February 18, 1988, this court entered its order for further proceedings, directing that the plaintiff's objections to the motion to reopen the case should be addressed in a motion for summary judgment of dismissal. That motion was filed by the plaintiff on March 3, 1988. Among other grounds, the plaintiff asserted laches, contending that as debtor in the bankruptcy proceeding it had relied on the trustees' inaction and the failure to prosecute their claim in the Bankruptcy Court. At the hearing on this motion and the trustees'

cross-motion for summary judgment on their counterclaim for withdrawal liability, this court concluded that the question of laches could best be determined by the Bankruptcy Judge who had pending before him the trustees' motion to file a late response to Centric's objection to their claim. The court also denied the trustees' motion to withdraw the reference to the Bankruptcy Judge by the order of deferral entered July 5, 1988.

Subsequently, Bankruptcy Judge Brooks denied the trustees' motion to respond to the objection to claims in a memorandum opinion and order of July 14, 1988, which was the subject of an appeal, docketed in this court as Civil Action No. 88-M-1386, in which this court has entered its order affirming the order of Bankruptcy Judge Brooks. In his memorandum opinion and order, Bankruptcy Judge Brooks correctly applied the factors set forth in *In Re Magourick*, 693 F.2d 948, 951 (9th Cir. 1982). Those factors concerning the allowance of a tardy claim in bankruptcy are controlling on the laches question in this civil action.

What is apparent here is that despite the issuance of the order granting relief from stay, thereby permitting the trustees to prosecute their counterclaim in this civil action, the trustees' former legal counsel decided to proceed through the proof of claim filed in the bankruptcy proceedings and then neglected to prosecute that claim in a timely manner. Current counsel for the trustees then discovered that although no distribution is expected from the bankruptcy proceedings, a bond had been posted in this civil action to secure payment of withdrawal liability by a stipulation which resolved the trustees' motion for interim payments, which motion and stipulation were

filed before Judge Moore's order denying plaintiff's motion for summary judgment. Accordingly, the trustees seek to recover on that bond. Even assuming that the bond is not an asset of the bankruptcy estate, the failure of the trustees to prosecute the counterclaim here for more than 20 months after receiving the order granting relief from stay is inexcusable and would cause substantial detriment to the plaintiff by proceeding with the litigation of the counterclaim. In that regard, this court rejects the contention of the trustees made in their cross-motion for summary judgment that there are no issues to be tried because of the failure of Centric to seek arbitration after receipt of notice of withdrawal liability. In this court's view, the initiation of this civil action by Centric excuses the requirement to seek arbitration.

For these reasons, it is now

ORDERED that the defendants' motion for summary judgment is denied, the plaintiff's motion for summary judgment is granted, and this civil action is dismissed.

Dated: March 14, 1989.

BY THE COURT:

Richard P. Matsch, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 88-M-1386
Bankruptcy Case No. 85-B-03769-M

IN RE:

TRUSTEES OF THE CENTENNIAL STATE CARPENTERS PENSION TRUST FUND,

Plaintiffs-Appellants,

v.

CENTRIC CORPORATION,

Defendant-Appellee.

MEMORANDUM OPINION AND ORDER

MATSCH, Judge

This is an appeal under 28 U.S.C. § 158(a) from an order entered by Bankruptcy Judge Brooks on August 17, 1988, denying the appellants' motion to alter or amend the order of July 18, 1988, which denied a motion to file a late response to the debtor's objection to a proof of claim filing by the Trustees of the Centennial State Carpenters Pension Trust Fund (Trustees) on April 15, 1986. The bankruptcy judge's findings of fact and conclusions of law were set forth in a memorandum opinion and order, dated July 14, 1988, and entered on the docket on July 18, 1988. After reviewing the record of proceedings before the Bankruptcy Court, this court has determined that there was no error of fact or law in Judge Brooks' memorandum opinion and order.

The appellants' contend that the procedure directed by the local bankruptcy rules requiring creditors to file a response to a debtor's objection to the creditor's claim is not consistent with the Bankruptcy Code or Bankruptcy Rules. While that pleading is not required by the Bankruptcy Code or Bankruptcy Rules, the appellants have failed to show that such procedure is prohibited. The appellants also contend that the bankruptcy judge erred in signing an order disallowing claims on June 29, 1988, nunc pro tunc August 10, 1987. The issuance of that order, nunc pro tunc or otherwise, is irrelevant to the denial of the appellants' motion to file a late response to the debtor's objection to the claim. The determination made by Bankruptcy Judge Brooks constitutes a procedural rejection of the claim, without reference to the underlying merits of the basis for the claim and is an effective disposition of the claim, independently of the June 29, 1988, order.

Upon the foregoing, it is

ORDERED that the bankruptcy judge's order is affirmed.

Dated: March 14, 1989

BY THE COURT:

Richard P. Matsch, Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO IN BANKRUPTCY

In re:	)	Bankruptcy
	)	Case No.
CENTRIC CORPORATION,	)	85-B-03769-M
Debtor.	)	

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court upon a (1) Motion to Allow Trustees to File a Response to Centric Corporation's Objection to Claims and (2) Motion to Withdraw Reference, both filed by a creditor of the Debtor, the Trustees of the Centennial State Carpenters Pension Trust Fund ("Trust Fund"). Objections to each of those motions were filed by the Debtor. The Court has received Memorandum Briefs from each of the parties and has heard oral argument on the issues presented. This Memorandum Opinion represents the findings of fact and conclusions of law in accordance with B.R. 9014 and B.R. 7054.

BACKGROUND AND FINDINGS OF FACT

This bankruptcy case and the dispute between this Debtor and the Trust Fund has been rather long and tortured. The facts before the Court, essentially stipulated to by the parties, are as follows:

1. Prior to the time the Debtor filed for bankruptcy protection, the Trust Fund and the Debtor were involved in litigation in the United States District Court for the District of Colorado (Civil Action No. 83-JM-2510). That litigation was commenced by Centric Corporation ("Centric") on or about December 30, 1983 against the Trust

Fund, whereby Centric requested the District Court enter an Order declaring the Trust Fund's claim against the Debtor to be invalid and unconstitutional. The Trust Fund had claimed Centric was liable to it under the Employee Retirement Income Security Act of 1974, as amended, after withdrawal under a pension plan.

2. Centric filed a Petition in bankruptcy under Chapter 11 of the United States Bankruptcy Code on July 3, 1985, and is the Debtor-in-Possession in this matter. On or about April 15, 1986, the Trust Fund filed a Proof of Claim in the bankruptcy case for $372,775.00. On May 15, 1987, Centric filed an Objection to Claims. Contained within the Objection to Claims, at page 7, paragraph 23(10), was an objection to the unsecured claim of the Trust Fund.

3. On May 18, 1987, Centric sent to all claimants including the Trust Fund, a Rule 23 Notice of Centric's Objection to Claims, which Notice stated that any party opposing Centric's Objection must file a written request for a hearing with the Court on or before June 22, 1987. The Notice further stated in the absence of a timely and substantive request for a hearing by an interested party, the Court would act on the aforementioned application on June 29, 1987. On July 21, 1987, a proposed form of Order as to Centric's Objection to Claims was filed with the Court.

4. The Trust Fund failed to file a response to the Objection, request a hearing, or request an extension of time in which to respond. Several requests for hearings were made by other parties. A hearing was held on

August 10, 1987, to resolve those claims and objections thereto.

5. The Trust Fund then requested, seven months after its initial response was due, (a) to have its claim removed from the Bankruptcy Court and considered by the District Court, and (b) permission from this Court to file a response to Centric's Objection to Claims.

6. On May 13, 1986, the United States Bankruptcy Court entered an Order modifying the automatic stay which allowed the Trust Fund to pursue its claim in the United States District Court. Twenty months thereafter, on January 29, 1988, the Trust Fund filed a Motion in the United States District Court to reopen the case and, on February 8, 1988, the case was reopened.

DISCUSSION AND CONCLUSIONS OF LAW

There are two issues presented to the Court by the Trust Fund's Motions: (1) whether or not this matter referred to the Bankruptcy Court pursuant to 28 U.S.C. § 157(a) should be withdrawn to the United States District Court for the District of Colorado, and (2) whether or not the Trust Fund, an unsecured contingent creditor, should be allowed to file a tardy response to Centric's Objection to Claims.

1. Withdrawal of Reference to the District Court.

The issue of whether or not a case referenced to the Bankruptcy Court, pursuant to 28 U.S.C. § 157(a), should be withdrawn back to the U.S. District Court is

governed by 28 U.S.C. § 157(d) and B.R. 5011(a).[1] By the clear language of the statute and the rule, this Court is required to defer to the United States District Court on all questions of withdrawal of cases referred to the Bankruptcy Court and will do so in this case.

2. Filing of Trustees' Response to Debtor's Objection to Claims.

The Trust Fund filed its Motion to Allow Trustees to File a Response to Debtor's Objection to Claims ("Motion to Respond") on January 29, 1988, seven months after any response was due. The Trust Fund filed its Motion to Reopen Case in the District Court litigation on January 29, 1988, 20 months after the Bankruptcy Court granted relief from stay on May 13, 1986. This constitutes delay in the extreme, not once but twice.

This Debtor, and the creditor, have been subjected to extraordinary administrative delay and case management difficulties due to various factors including the crowded Court docket and the departure of Judge John McGrath. In three years, this Debtor has been transferred through six different courtrooms, Judge Gueck,

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[1] On July 5, 1988, U.S. District Court Judge Richard Matsch refrained from ruling on questions in the litigation and appears to have implicitly denied the Trust Fund's Motion to Withdraw Reference. He issued an Order of Deferral to this Bankruptcy Court requiring this Court to first decide the Trust Fund's Motion to Allow Trustees to Respond to Debtor's Objection to Claims and then the District Court will consider and decide Motions for Summary Judgment pending in Civil Action No. 83-M-2510, the litigation intended to establish the Trust Fund's claim and Debtor's liability.

Judge McGrath, Judge Brumbaugh, Judge Matheson, a rotation of visiting judges, and now, finally, Judge Brooks.

This Court is convinced that if it were to allow the response of the Trust Fund to the Debtor's Objection to Claims, which was extremely tardy and which was the product of what is admitted to be simple oversight and neglect, then further unnecessary delay, cost, and disruption to the case is assured. Moreover, it will likely serve no one's interest to allow the objection, particularly in view of the probability there is no distribution to unsecured creditors in this case.[2]

To grant the Motion to Respond will, inevitably, cause continuing confusion in an already disrupted bankruptcy case, further dissipate an estate already too inadequate to allow distribution to unsecured creditors, and send a message to creditors and the bar alike that schedules, timelines, and bar dates are not of importance in bankruptcy proceedings.

There is ample and persuasive authority for denying the Trust Fund the right to now oppose the Debtor's Objection to Claims and revive an otherwise disallowed claim. This Court is persuaded that the law relied on and reasoning set forth in *In re Standard Metals*

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[2] The Debtor's Notice of Distribution of Assets indicates that *no distributions* will be made to unsecured creditors. This is a liquidating Chapter 11 with assets, and asset values, evidently insufficient to provide a distribution to unsecured creditors. *Even if* the Trust Fund's claim is allowed, in its entirety, and there were enough assets for some distribution to unsecured creditors, still the Trust Fund would only be entitled to a small fraction of any such distribution.

Corp., 48 B.R. 778 (Bankr. D. Colo. 1985) and *In re Anderson Resources Corp.*, 61 B.R. 583 (Bankr. D. Colo. 1986) is sound and justifies denial of the Trust Fund's Motion to Respond.

In *In re Standard Metals*, a creditor filed a proof of claim and a motion to allow the late filing of that claim approximately five months after he knew of the claim. The creditor filed his proof of claim approximately two and one-half months after the bar date established by the Court, but well before confirmation of the debtor's Chapter 11 plan of reorganization.[3] The court relied on the factors enumerated by the Ninth Circuit in *In re Magouirk*, 693 F.2d 948 (9th Cir. 1982), to decide whether or not tardy claims would be accepted by the court. The factors relied upon were as follows:

> (1) [W]hether granting the delay will prejudice the debtor, (2) the length of the delay and its impact on efficient court administration, (3) whether the delay was beyond the reasonable control of the person whose duty it was to perform, (4) whether the creditor acted in good faith, and (5) whether clients should be penalized for their counsel's mistake or neglect.
>
> *In re Magouirk, supra* at 951.

When this Court reviews the status, history and assets of this case and measures those features of the case against the factors set forth above, the Court can only

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[3] While it is significant in *Standard Metals* that the debtor was in Chapter 11, and the court specifically found that allowance of the late filed claim would be disruptive to the debtor's plan of reorganization, the law and reasoning in that case are useful and applicable in the instant case.

conclude that permitting the tardy response, and allowing the claim, at this late date, is not warranted. The *Magouirk* factors numbered one, two and three are each heavily weighted in favor of disallowing the tardy response of the Trust Fund.

The Court will not here recite the different scenarios which could evolve in the event the Trust Fund's claim is allowed. It is sufficient to simply reference the obvious fact that approving the Trust Fund's Motion to Respond and opening the door to allowance of its claim, will result in resumption of the pending litigation and continuation of the struggle between these parties to establish liability and the amount of liability, if any. The cost to and disruption of the estate, the dissipation of estate assets, the continued delay for creditors which are entitled to a distribution, and maintenance of a moribund Chapter 11 case in the Bankruptcy Court thwarting any semblance of judicial efficiency, are assured consequences of granting the Trust Fund's Motion to Respond.

While the Court does not question the "good faith" aspect of the creditor's conduct or precisely who was responsible for the creditor's neglect, counsel or creditor (*Magouirk* factors four and five), the Court can assume good faith and some shared responsibility for neglect, in light of the 20-month hiatus and seven-month delay. Assuming that the creditor did, indeed, act in good faith and that the client should not be penalized for counsel's neglect, still the negative aspects of granting the Trust Fund's Motion to Respond are so substantial and compelling that this Court is convinced that granting the relief requested still is not warranted.

In *In re Anderson Resources,* Judge Brumbaugh decried delays in scheduling and inattention to rules of procedure as " . . . the chief culprits for the congestion facing the Court in this country . . . ." That conclusion is one shared, in some measure, by this Court. That conclusion is reinforced manyfold when applied to the Bankruptcy Court in the District of Colorado because of the case load and system overloaded with far more proceedings than can be handled in a prompt and proper fashion. In the best of circumstances, delays and disruption should not be lightly ignored. In the circumstances prevalent in this Bankruptcy Court, delays and disruptions simply cannot be ignored.

Finally, there are a number of cases in which various different bankruptcy courts have refused to allow tardy objections to claims disallowed by a trustee or debtor-in-possession. *In re Carr,* 66 B.R. 429 (Bankr. D.R.I. 1986); *In re Yoder Co.,* 29 B.R. 299 (Bankr. N.D. Ohio 1983); *In re F/S Communications Corp.,* 59 B.R. 824 (Bankr. N.D. Ga. 1986). These cases hold, generally, that a creditor has an obligation to act diligently and timely in objecting to the disallowances of a claim. Whether the theory is denoted as one where the creditor lacked *"excusable* neglect," *laches,* or failed to carry out its "affirmative duty" to act diligently, the principle is essentially the same. Creditors who sit on their rights – particularly those who do so for extended periods of time and with no reasonable explanation therefore – are not entitled to object, or assert their claims, when it will result in delay, cost, disruption, or disadvantage to the debtor, creditors, and/or orderly bankruptcy case administration.

Based on the foregoing, it is

ORDERED that the Trust Fund's Motion to Allow Trustees to File a Response to Centric's Objection to Claims shall be and is hereby DENIED and the claim of the Trust Fund is hereby DENIED.

DATED this 14th day of July, 1988.

BY THE COURT:

Sidney B. Brooks,
United States Bankruptcy Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 83-JM-2510

CENTRIC CORPORATION,

Plaintiff,

vs.

TRUSTEES OF THE CENTENNIAL STATE CARPENTERS PENSION TRUST FUND, et al.,

Defendants.

ORDER

This matter is before me on plaintiff Centric Corporation's motion for summary judgment. At issue is the constitutionality of the withdrawal liability provision of the Multiemployer Pension Plan Amendments Act (MPPAA), amending the Employee Retirement Income Security Act (ERISA) and the amounts assessed thereunder to plaintiff corporation. The issues have been fully briefed. Jurisdiction is proper under 28 U.S.C. § 1331 and 29 U.S.C. §§ 1001-1461.

An employer in the construction industry, plaintiff Centric Corporation contributed to a multiemployer pension plan as provided by its collective bargaining agreement with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (the Union). The defendant Centennial State Carpenters Pension Trust Fund (the Plan) is a multiemployer pension plan established pursuant to 29 U.S.C. § 186 and covering primarily workers

in the building and construction industry. Plaintiff contends that withdrawal liability of $372,755 was assessed by the defendant Plan even though plaintiff continued to bargain with the Union. Defendant counters that after the Union agreements expired by their own terms, plaintiff signed various project agreements which served to extend the terms and conditions of the former agreement for the duration of the job.

Plaintiff contends that the statute on which withdrawal liability is assessed unconstitutionally usurps plaintiff's right to due process, equal protection, and the right to a jury trial in violation of the Fifth and Seventh Amendments to the Constitution. Moreover, relying on the recent Supreme Court decision in *I.N.S. v. Chadha*, ___ U.S. ___, 103 S. Ct. 2764 (1983), plaintiff argues that the statute and its amendment must fall because its enforcement authority derives from the Reorganization Act of 1977, containing a one-house veto provision which the court found unconstitutional in *Chadha*. Finally, plaintiff states that in the alternative, if the statute is not declared unconstitutional, Centric merits an exemption under the provision that contributions are suspended during a labor dispute.

In response, defendant contends that the statute is constitutional both as a legislative act and in light of the *Chadha* decision. Defendant raises disputed facts which it contends do not support plaintiff's exemption under the labor dispute exception.

While summary judgment is an appropriate mechanism to dispose of legal questions of statutory and regulatory construction, *Mobil Oil Corp. v. FEA*, 566 F.2d 87, 92

(Em. App. 1972) [sic], the moving party must demonstrate beyond a reasonable doubt that there are no disputed facts or inferences therefrom that would require a court's ultimate resolution. *Norton v. Liddel*, 620 F.2d 1375, 138i (10th Cir. 1980). All facts material to the outcome of the litigation will be viewed in a light most favorable to the party opposing summary judgment. *Otteson v. United States*, 622 F.2d 516, 519 (10th Cir. 1980).

The constitutional issues raised by plaintiff have been addressed by the recent Supreme Court decision, *Pension Benefit Guaranty Corp. v. R.A. Gray*, ___ U.S. ___, 104 S. Ct. 2709 (1984). In relating the legislative history of the MPPAA, the *Gray* court underscored that the focus of Congressional concern in amending ERISA was to strengthen its very funding base by providing a disincentive to voluntary employer withdrawal by the payment of a commensurate withdrawal liability. Following its analysis in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) which upheld the Federal Coal Mine Health and Safety Act of 1969 against attacks of retroactive penalties, the court found no violation of the Due Process Clause. "Legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Gray* at 2718 (citations omitted). Deference to Congressional expertise in the field of national economic policy was necessary in the light of this clearly expressed congressional purpose. "[T]he MPPAA withdrawal provisions . . . are a rational means of allocating among a group of employers the collective burden of ensuring that their employees receive full compensation." *Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502 (D.C. Cir. 1984).

The Equal Protection and Seventh Amendment right to trial by jury challenges are equally without merit and have been fully addressed in *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628, 639-42 (4th Cir. 1983) and *Bassett Construction Co. v. Trustees of the Centennial State Carpenters Pension Trust Fund*, 83-F-980, filed February 22, 1985. Similarly is *I.N.S. v. Chadha*, (*supra.*) misapplied. No Congressional action is involved here. This suit was commenced by a private employer who sought neither Labor Department nor other Congressional support. Moreover, severance of the disputed statutory provisions was the court's remedy in *Chadha* to save the legislation.

Finally, plaintiff asks this court to rule on the basis of the briefs and supporting affidavits that Centric's liability falls within the labor dispute exception, 29 U.S.C. § 1398. The factual chasm widens here precluding summary relief on this issue.

Upon the foregoing, it is

ORDERED, that plaintiff's motion for summary judgment, filed October 15, 1984, is denied.

DATED at Denver, Colorado, this 26th day of April, 1985.

BY THE COURT:

John P. Moore, Judge
United States District Court

29 U.S.C. § 1145. Delinquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C. § 1398. Withdrawal not to occur because of change in business form or suspension of contributions during labor dispute

Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because –

(1) an employer ceases to exist by reason of –

(A) a change in corporate structure described in section 1362(d) of this title, or

(B) a change to an unincorporated form of business enterprise,

if the change causes no interruption in employer contributions or obligations to contribute under the plan, or

(2) an employer suspends contributions under the plan during a labor dispute involving its employees.

For purposes of this part, a successor or parent corporation or other entity resulting from any such change shall be considered the original employer.

29 U.S.C. § 1401. Resolution of disputes

(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc.

(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title

shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of –

> (A) the date of notification to the employer under section 1399(b)(2)(B) of this title, or
>
> (B) 120 days after the date of the employer's request under section 1399(b)(2)(A) of this title.

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 1399(b)(1) of this title.

(2) An arbitration proceeding under this section shall be conducted in accordance with fair and equitable procedures to be promulgated by the corporation. The plan sponsor may purchase insurance to cover potential liability of the arbitrator. If the parties have not provided for the costs of the arbitration, including arbitrator's fees, by agreement, the arbitrator shall assess such fees. The arbitrator may also award reasonable attorney's fees.

(3) (A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

(B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the

determination shows by a preponderance of evidence that–

(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or

(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

(b) Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitration proceedings

(1) If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 1451 of this title to enforce, vacate, or modify the arbitrator's award.

(3) Any arbitration proceedings under this section shall, to the extent consistent with this subchapter, be

conducted in the same manner, subject to the same limitations, carried out with the same powers (including subpena power), and enforced in United States courts as an arbitration proceeding carried out under Title 9.

(c) Presumption respecting finding of fact by arbitrator

In any proceeding under subsection (b) of this section, there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct.

(d) Payments by employer prior and subsequent to determination by arbitrator; adjustments; failure of employer to make payments

Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title).

(e) Furnishing of information by plan sponsor to employer respecting computation of withdrawal liability of employer; fees

If any employer requests in writing that the plan sponsor make available to the employer general

information necessary for the employer to compute its withdrawal liability with respect to the plan (other than information which is unique to that employer), the plan sponsor shall furnish the information to the employer without charge. If any employer requests in writing that the plan sponsor make an estimate of such employer's potential withdrawal liability with respect to the plan or to provide information unique to that employer, the plan sponsor may require the employer to pay the reasonable cost of making such estimate or providing such information.

29 U.S.C. § 1451. Civil actions

(a) Persons entitled to maintain actions

(1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

(2) Notwithstanding paragraph (1), this section does not authorize an action against the Secretary of the Treasury, the Secretary of Labor, or the corporation.

(b) Failure of employer to make withdrawal liability payment within prescribed time

In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same

manner as a delinquent contribution (within the meaning of section 1145 of this title).

(c) Jurisdiction of Federal and State courts

The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

(d) Venue and service of process

An action under this section may be brought in the district where the plan is administered or where a defendant resides or does business, and process may be served in any district where a defendant resides, does business, or may be found.

(e) Costs and expenses

In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.

(f) Time limitations

An action under this section may not be brought after the later of–

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

(g) Service of complaint on corporation; intervention by corporation

A copy of the complaint in any action under this section or section 1401 of this title shall be served upon the corporation by certified mail. The corporation may intervene in any such action.